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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

FLOYD MITCHELL et al., Plaintiffs and Appellants, v. PACIFIC MARITIME ASSOCIATION et al., Defendants and Respondents.	B230326 (Los Angeles County Super. Ct. No. NC 053456)

APPEAL from a judgment of the Superior Court for the County of Los Angeles. Ross M. Klein, Judge. Affirmed in part, reversed in part and remanded.

Law Offices of Ian Herzog, Evan D. Marshall, Ian Herzog and Justin Ehrlich for Plaintiffs and Appellants.

Morgan, Lewis & Bockius, Teri E. Kirkwood and Clifford D. Sethness for Defendants and Respondents Pacific Maritime Association and Maersk, Inc.

Epstein, Becker & Green, Steven R. Blackburn, Dena L. Narbaitz, Matthew A. Goodin and Brooke A. Brown for Defendants and Respondents Hanjin Shipping Co., Ltd., and Evergreen Shipping Lines.

SUMMARY

The trial court sustained demurrers and dismissed a complaint filed by four security guards against the Pacific Maritime Association (PMA), Hanjin Shipping Co., Ltd., Evergreen Shipping Agency and Maersk, Inc., alleging a racially hostile work environment on the Long Beach docks. We conclude the complaint properly stated a claim against PMA and Hanjin, but not against Evergreen and Maersk.

FACTS

Plaintiffs Floyd Mitchell, Kisha Hall, Stanley Parks and Danny Frierson are African Americans who were hired by defendant PMA as security guards on various dates between 1995 and 2004. Plaintiffs were hired to perform security duties at the docks in Los Angeles County, and all were eventually assigned to work exclusively at defendant Hanjin's dock.

In August 2008, all four plaintiffs filed complaints with the Department of Fair Employment and Housing, and all obtained "right to sue" letters. In September 2009, they sued PMA, Hanjin, Evergreen, Maersk and two individual defendants, Jack Mathlin, a management employee of Hanjin, and Al Garcia, a management employee of Maersk, alleging a racially hostile work environment at the Long Beach docks.

After two demurrers were sustained with leave to amend, plaintiffs filed a second amended complaint (the complaint). The complaint omitted the allegations that had identified Evergreen, Maersk and Al Garcia as defendants, although plaintiffs did not delete them from the caption of the complaint. (About a month later, plaintiffs filed a request for dismissal without prejudice as to defendant Garcia.) Plaintiffs asserted causes of action against "all defendants" for violation of the Fair Employment and Housing Act (FEHA; Gov. Code, § 12900 et seq.), intentional infliction of emotional distress, and breach of fundamental public policy, based on the following allegations, which we take as true.

Defendant PMA "is a managing agent providing labor management and staffing to its member corporations . . . ." Defendant Hanjin is a PMA member company. Defendant Jack Mathlin was a PMA employee "and manager at the Hanjin . . . terminal,

holding a position with authority to implement [PMA]'s and Hanjin's spoken and unspoken employment and personnel policies." PMA is the direct employer of each plaintiff and "each individual defendant." Hanjin and Doe defendants are in a principal-agent relationship with PMA, and PMA is "charged with managing the docks for and in 'benefit of same[,'] including but not limited to interviewing and screening prospective employees, making initial and subsequent work assignments, reassignments, and transfers on behalf of its various dock workers and member companies, including but not limited to enforcing all labor agreements between its member companies and the labor workers, participating in the negotiations and enforcement of prospective and existing labor contracts, maintaining payroll records and providing performance evaluations."

While PMA is "charged with managing the conditions of the work place, it is doing so as the authorized agent of [Hanjin] . . . ." Hanjin and other member companies of PMA "have the ability to control [PMA's] conduct with regard to the management of the docks and implementation of policies that would create[] a workplace free of racial harassment."

The complaint alleges that the environment at the Long Beach docks "has been racially charged in particular towards African Americans" for some time. "In the early fall of 2007 the hostility that had previously existed reached a dangerous, despicable, and malicious level when [*sic*] the use of racially charged inflammatory language and multiple displays of hangman's nooses by managing agents of various stevedores on port vehicles, among other places."

Plaintiffs alleged that the "use of the term 'n[-----]' on the docks, especially on the transportation buses is exceedingly common." Examples alleged in the complaint (see pp. 4-5, *post*) "of overt and malicious racially harassing activity is not an exhaustive list of every incident[] of racial harassment and/or discrimination but exemplifies the overt and pervasive nature of the behavior . . . as well as being illustrative of the environment created on the docks by the various employers that would allow and tacitly or expressly encourage this behavior."

The complaint alleged that in earlier years, "employees who were found responsible for racially charged language were subjected to perfunctory and superficial grievance procedures, rarely terminated or rarely subjected to severe sanctions, and were frequently simply reassigned to other docks for a period of time and then transferred back . . . . This ineffectual and perfunctory approach to providing a non-hostile work environment encouraged the repetition of racially offensive behavior, and discouraged the recipients of this behavior from making complaints, contributing to a climate of fear and hostility."

Plaintiffs alleged several examples of racial harassment.

In one instance in the fall of 2006, plaintiff Kisha Hall was driving a security transportation vehicle when one of the "lashers" called her a "n----- bitch" and "stated he would 'fuck you up n[-----] . . . we're here to stay.'" The lasher later "raised his fist as if to make [plaintiff] believe he was going to hit her." When he got off the bus, he continued to yell obscenities at plaintiff. The incident "led to a perfunctory arbitration proceeding with an unsatisfactory outcome, leaving [plaintiff] continually exposed to passengers on the bus referring to her as a 'jungle bunny' and a 'nappy head[,'] fearful for her job and reluctant to complain or otherwise exercise her grievance rights until October 29, 2007 . . . ." On that date, plaintiff Hall was assigned to check identifications at the vendors' gate, "and was directly exposed to a driver entering the [Hanjin] dock with a small noose hanging in his rear view mirror, and another larger noose hanging off of the rear of a [Hanjin] truck."

The complaint alleged that on October 29, 2007, defendant Mathlin, a foreman at the Hanjin terminal, "hung a full size hangman's noose off of the antennae for port vehicle # 15127. Inside the noose was a black doll purportedly intended to suggest a lynching of an African American. All [p]laintiffs witnessed these nooses, and reported their presence to supervisors . . . ." Photographs were taken and are attached as an exhibit to the complaint.

The complaint alleged three other instances of racial harassment, although these did not occur at the Hanjin dock. In one incident, Al Garcia, a foreman at the Maersk

terminal, "was responsible for hanging a noose from a rear view mirror of a port vehicle which was present for over one week," during which "multiple [f]oremen would have used that vehicle and been exposed to the noose." The noose was removed after security officers complained, but management "did not effect any meaningful punishment for the incident . . . despite the despicable nature of the act," and Garcia "continues to work at the port." In another instance, "a [f]oreman for APL came to work wearing a T-shirt displaying a large noose on the back and . . . he continues with his previous employment." And on another occasion, an African American foreman "witnessed a noose displayed on the back bumper of a port vehicle at the Evergreen American Lines."

The complaint alleged that these incidents "illustrate a pervasive tolerance for multiple incidents exhibiting pernicious racial antagonism and harassment of minority co-workers and the grave nature of the environment in which African American longshoreman [*sic*] must work," and "highlight[] the fact that the racial animus contains a very real threat of physical violence."

The complaint further alleges that each plaintiff "perceived that the presence of multiple hangman's nooses . . . was a clear and unmistakable threat of violence against them as African Americans. . . . Although [p]laintiffs only personally viewed one full sized noose with one black doll hanging therefrom, they were aware of the other incidents involving noose displays and racially hate filled language, [and] each viewed the incidents as related and part of a widespread existence of growing racial animus that was encouraged, acquiesced, and/or ratified by each defendant."

Plaintiffs alleged that PMA, which is charged with "managing the conditions on the docks for and on behalf of" its member companies, "was in a position where it knew or should have known of the conduct described above, including but not limited to the use of symbols evincing threats of grave physical violence. Despite multiple complaints and grievance procedures the offending conduct by these same and other co-employees continue[d] due to the failure of all defendants to meaningfully enforce labor laws."

Relying on the allegations just described, the complaint alleged a violation of the FEHA, asserting that each of the plaintiffs "has been subjected to verbal slurs and

derogatory comments based on race"; each had witnessed the noose display; and each "was aware of the racially incendiary language used on the docks as well as the affirmative, threatening steps taken (on multiple occasions) to hang nooses." The harassment was "sufficiently severe such that the conditions of employment were altered"; each plaintiff was "forced to perform his or her job function in fear of physical violence, as well as being demeaned and insulted by a pattern of permitting, acquiescing, and/or ratifying conduct . . . ." Claims for intentional infliction of emotional distress and breach of fundamental public policy were alleged based on the same conduct.

Hanjin and Evergreen jointly filed a demurrer to plaintiffs' second amended complaint, as did PMA and Maersk. The trial court sustained the demurrers with leave to amend, observing that plaintiffs "have again failed to identify either the specific violation of the FEHA at issue or the Defendant(s) who allegedly violated the FEHA." The court found the factual allegations similarly insufficient to establish that the defendants engaged in harassing conduct that would support the cause of action for intentional infliction of emotional distress, and likewise found the allegations underlying the claim for breach of fundamental public policy insufficient. The trial court gave plaintiffs "one final opportunity for leave to amend," but plaintiffs chose to stand on their second amended complaint. A judgment of dismissal without prejudice was entered in favor of PMA, Hanjin, Maersk and Evergreen, and this appeal followed.

DISCUSSION

Our review in this case is de novo. (*Hervey v. Mercury Casualty Co.* (2010) 185 Cal.App.4th 954, 960.) We give the complaint a reasonable interpretation, and treat the demurrer as admitting all facts properly pleaded, but not contentions, deductions or conclusions of law or fact. (*Vernon v. State of California* (2004) 116 Cal.App.4th 114, 121-122 (*Vernon*).) " ' "[I]t is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory." ' " (*Id.* at p. 122.)

We agree with the trial court that the complaint does not state a claim against Maersk and Evergreen. There are no party allegations against them, and the few allegations that do allude to those defendants are insufficient to establish a claim against

them. All that is said about Maersk is that Al Garcia, a foreman at the Maersk terminal, hung a noose from the rear view mirror of a port vehicle. Similarly, all that is said about Evergreen is that an African American foreman, who is not a party, saw a noose displayed on the back bumper of a port vehicle at Evergreen's premises. No employment relationship is alleged between plaintiffs and either Maersk or Evergreen. These facts, even read liberally in the context of the overall complaint, are insufficient to state a claim against Maersk or Evergreen.

But the demurrer should not have been sustained against PMA and Hanjin. The complaint sufficiently alleges the existence of an employment relationship between the plaintiffs and both PMA and Hanjin, and it sufficiently alleges the existence of a racially hostile work environment under the control of PMA or Hanjin or both.

First, the employment relationship: The FEHA "predicates potential 'liability on the status of the defendant as an "employer." [Citation.]' [Citation.] The fundamental foundation for liability is the 'existence of an *employment* relationship between the one who discriminates against another and that other who finds himself the victim of that discrimination.' [Citation.] FEHA requires 'some connection with an employment relationship,' although the connection 'need not necessarily be direct.' [Citation.]" (*Vernon*, *supra*, 116 Cal.App.4th at p. 123.)

Various tests have been adopted by the courts "to determine the existence of an employer/employee relationship," and " '[t]here is no magic formula for determining whether an organization is a joint employer.' " (*Vernon*, *supra*, 116 Cal.App.4th at pp. 124-125.) The "common and prevailing principle" in all of the tests requires a court to consider the " 'totality of circumstances' that reflect upon the nature of the work relationship of the parties, with emphasis upon the extent to which the defendant controls the plaintiff's performance of employment duties." (*Id.* at p. 124.) " '[T]he precise contours of an employment relationship can only be established by a careful factual inquiry.' " (*Id.* at p. 125.)

Giving the complaint a reasonable interpretation (*Vernon*, *supra*, 116 Cal.App.4th at p. 121), it alleges an employment relationship between plaintiffs and both PMA and

Hanjin. As to PMA, the complaint alleges all plaintiffs are employees of PMA and that PMA assigned all of them to work at the Hanjin terminal. It alleges PMA acts as the labor agent for its member companies, including Hanjin, providing a variety of employment-related services, from interviewing and hiring to handling payroll and labor negotiations. It alleges that defendant Mathlin, the Hanjin foreman who allegedly hung a noose from the antennae of a port vehicle, is a PMA employee, and (by inference) that Al Garcia, who is alleged to have hung a noose from a rear view mirror of a port vehicle, was a PMA employee, and that PMA undertook to manage workplace conditions. (While PMA asserted in its demurrer that plaintiffs are mistaken in believing that any waterfront worker is a PMA employee, its demurrer assumes all factual assertions to be true.)

As to Hanjin, the complaint alleges all four plaintiffs work at the Hanjin terminal, PMA acts as Hanjin's authorized agent in managing the conditions of the workplace, and Hanjin has the ability to control PMA's conduct in the management of the dock. While the complaint does not expressly describe Hanjin is a "joint" or "special" or "dual" employer, these allegations, given a reasonable interpretation, effectively say just that. (See *Vernon*, *supra*, 116 Cal.App.4th at pp. 124-125 ["no magic formula for determining whether an organization is a joint employer"; careful factual inquiry is required]; see also *Bradley v. Department of Corrections & Rehabilitation* (2008) 158 Cal.App.4th 1612, 1629 ["liability is predicated on the allegations of harassment or discrimination involving the terms, conditions, or privileges of employment *under the control of the employer*, and . . . the employment relationship exists for FEHA purposes within the context of the control retained"].) In short, Hanjin's and PMA's status as plaintiffs' employer is a matter for summary judgment or trial; it cannot be determined on a demurrer with the facts alleged in this complaint.

We likewise conclude that the complaint sufficiently alleges facts showing a racially hostile work environment under the control of PMA or Hanjin or both. To establish a claim for harassment based upon a hostile work environment, the employee must demonstrate "that the conduct complained of was severe enough or sufficiently pervasive to alter the conditions of employment and create a work environment that

qualifies as hostile or abusive to employees" because of their race. (See *Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 462 (*Miller*) [sexual harassment], citing *Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 130 [racial harassment].) " '[W]hether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.' " (*Miller*, at p. 462.)

Here, while at the Hanjin terminal, all four plaintiffs saw a life-size hangman's noose hanging off the antennae of a port vehicle with a black doll inside. Other incidents involving nooses and verbal slurs are also alleged, and the allegations suggest that PMA and its member companies were aware of and tolerated race discrimination. The complaint alleges plaintiffs perceived the nooses as "a clear and unmistakable threat of violence against them as African Americans." The complaint alleges that the use of derogatory racial slurs on the docks and on the transportation buses "is exceedingly common" and that the examples of racially harassing activity are not exhaustive but rather illustrative of the environment on the docks. Although these allegations do not specifically indentify all the wrongdoers or who employed them, PMA undertook to manage workplace conditions. And Mathlin, the Hanjin manager alleged to have brought the full-size noose, is also alleged to have held a position with authority to implement PMA's and Hanjin's employment and personnel policies.

Hanjin asserts these "threadbare allegations do not constitute 'severe' harassment" and PMA refers to "the absolute absence of any factual allegations of any severe or pervasive harassment or any abusive work environment . . . ." We cannot agree with this reading of the complaint, and certainly cannot say, as a matter of law, that the allegations do not describe a work environment that "qualifies as hostile or abusive to employees" because of their race. (*Miller*, *supra*, 36 Cal.4th at p. 462.) Any such determination must await the evidence presented on a summary judgment motion or at trial. The same is true as to the causes of action for intentional infliction of emotional distress and breach of

fundamental public policy, both of which were based on the same conduct and treated identically by the trial court.

DISPOSITION

The judgment in favor of Evergreen Shipping Agency and Maersk, Inc., is affirmed. The judgment in favor of Pacific Maritime Association and Hanjin Shipping Co., Ltd., is reversed, and the cause is remanded to the trial court with directions to vacate its order sustaining the demurrers of PMA and Hanjin to the second amended complaint and to enter a new order overruling those demurrers. Appellants are to recover their costs on appeal.

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GRIMES, J.

WE CONCUR:

BIGELOW, P. J.

RUBIN, J.